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Office of Administrative Law Judges
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Date: March 11, 1998

Case No. 96-ERA-34

RONALD THOMPSON,
Complainant

v.

HOUSTON LIGHTING & POWER COMPANY,
Respondent

Case No. 96-ERA-38

RONALD THOMPSON,
Complainant

v.

HOUSTON LIGHTING & POWER COMPANY and HOUSTON INDUSTRIES, INC.
Respondents

For the Complainant:
David K. Colapinto, Esq.
Kohn, Kohn & Colapinto, P.C.
Washington, D.C.

[Page 2]

For the Respondents:
Randy T. Leavitt, Esq.
Michael Burnett, Esq.
Minton, Burton, Foster & Collins
Austin, Texas

Before:
DAVID W. DI NARDI
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This is a proceeding under the Energy Reorganization Act (hereinafter ERA), 42 U.S.C. §5851, as amended, and the governing regulations found at 29 C.F.R. Part 24. A complaint, identified as 96-ERA-34, was filed on April 2, 1996 and alleged retaliation in violation of the ERA when Respondent restricted Complainant's security access and reported to the NRC and STNP's Access Program Division that Complainant was a potential threat to the safety of the plant. (ALJ EX 2) A subsequent complaint, identified as 96-ERA-38, was filed on June 27, 1996 and alleged violation of the ERA rooted in breach of paragraphs 5(a), 5(b), 5(d), 5(e) and 5(f) of an October 25, 1995 fully-executed Settlement Agreement. (ALJ EX 7) The matters were consolidated by Order dated August 6, 1996. (ALJ EX 12; ALJ EX 13)

Prior to hearing, the parties submitted numerous Motions and Cross-Motions for Summary Decision. This Judge issued various Orders on those Motions and those Orders are specifically incorporated by reference into this Recommended Decision and Order. (ALJ EX 43; ALJ EX 78; ALJ EX 80; ALJ EX 89) Complainant has withdrawn his allegation of violation of the ERA rooted in breach of paragraph 5(a). (ALJ EX 77) In brief, this Judge **RECOMMENDS** that all but one issue be summarily dismissed from this case as a matter of law. The full and complete analysis for this recommendation may be found at the aforementioned Orders.[1]

The above-captioned matter proceeded to a full hearing on the remaining issue before the undersigned Administrative Law Judge. The hearing was held on October 6 and 7, 1997 in Houston, Texas. This Judge, having duly considered all the evidence of record, hereby **RECOMMENDS** that this complaint be **DISMISSED** for the reason that Respondents have not breached the Settlement Agreement or, in the alternative, for the reason that even if Respondents did breach the Agreement, Complainant has failed to satisfy his burden of proving, by a preponderance of the evidence, that Respondents intentionally discriminated against him.

[Page 3]

Preliminary Evidentiary Issue

The testimony of Dr. Edwin Carter, Complainant's witness, was allowed to be presented in deposition form. The Doctor was deposed on a pre- and post-hearing basis and the Respondents have submitted objection to certain parts of the testimony which has been proposed into evidence. This Judge, having duly considered Respondents' objections and Complainant's reply thereto (RX 58; CX 55; RX 62), hereby **SUSTAINS** Respondents' objection to the testimony at p. 45, line 20 through page 46, line 18 on the grounds that Dr. Carter testified he was not familiar with the rules and guidelines of the Nuclear Regulatory Agency; hereby **SUSTAINS** Respondents' objection to the testimony at page 224, line 1 through page 225, line 4 on the grounds that Dr. Carter is unqualified to render an opinion about the applicability of a legal privilege; and hereby **OVERRULES** Respondents' objection to Dr. Carter's testimony at page 249, line 5 through page 250, line 16 on the grounds that Dr. Carter's testimony was based in part on the letter he received from Dr. Parker. Furthermore, I accept this evidence not for the truth of what is stated, but as corroborative evidence for the testimony of Complainant accepted at hearing.

Complainant has moved to admit into evidence RX 29, the June 27, 1996 complaint letter, and RX 30, the Respondents' August 27, 1996 original answer. (CX 43; CX 44; CX 45) Respondents object to these pleadings being admitted into evidence. (RX 54) The objection is hereby **OVERRULED** based on the fact that formal rules of evidence do not apply in whistleblower proceedings and based on the fact that these pleadings are offered because they are incorporated into and clarify an exhibit offered at hearing and accepted into evidence.

Complainant's request (CX 56) to place the September 30, 1997 excerpts of Dr. Carter's deposition testimony in a restricted access portion of the record is hereby **GRANTED**. Similarly, it is hereby **ORDERED** that those portions of Complainant's post-hearing brief and those portions of Respondents' post-hearing brief which were previously designated by the parties as confidential are hereby placed in a restricted access portion of the record.

Complainant has objected to the authenticity of Respondents' exhibits 7 and 9, which purport to be the handwritten notes of Dr. George Parker. (ALJ EX 92) The objection to Exhibit 7 is **OVERRULED** and the exhibit is **ADMITTED** into evidence because of Dr. Parker's testimony, identifying those notes as the notes he prepared in anticipation of a conversation with Dr. Carter. (TR 224-225). The objection to Exhibit 9 is **SUSTAINED** because there was no authentication by Dr. Parker in its regard.

[Page 4]

With these evidentiary issues resolved, post-hearing evidence has been admitted as follows:[2]

CX 43	Letter dated October 14, 1997 from	10/14/97*

	Attorney Colapinto regarding intention to file post-hearing evidence
RX 53 10/21/97*	Letter dated October 21, 1997 from Attorney Leavitt regarding post-hearing deposition of Dr. Carter
RX 54 10/21/97*	Letter dated October 21, 1997 from Attorney Leavitt objecting to admission of Complainant's proposed exhibits
CX 44 10/24/97	Letter dated October 21, 1997 from Attorney Colapinto with proposed post-hearing evidence enclosed
CX 45 10/29/97	Letter dated October 29, 1997 from Attorney Colapinto in reply to Respondent's Letter of October 21, 1997
CX 46 11/19/97*	Letter dated November 19, 1997 from Attorney Colapinto establishing agreed upon briefing schedule
CX 47 12/15/97*	Letter dated December 15, 1997 from Attorney Colapinto requesting modification of briefing schedule
ALJ EX 93 12/15/97	Granting Request to Modify Briefing Schedule
CX 48 12/16/97*	Letter dated December 16, 1997 from Attorney Colapinto with
CX 49 12/16/97	Designated portions of Dr. Carter's September 30, 1997 deposition enclosed and
CX 50 12/16/97	Entirety of Dr. Carter's October 22, 1997 deposition enclosed
CX 51 12/18/97*	Letter dated December 18, 1997 from Attorney Colapinto requesting extension of time to file briefs
ALJ EX 94 12/18/97	Order Granting Extension of Time

RX 54 12/22/97*	Letter dated December 22, 1997 from Attorney Burnett regarding the filing of briefs and the filing of Respondent's objections to the deposition testimony of Dr. Carter	

[Page 5]

CX 52 12/23/97	Letter dated December 22, 1997 from Attorney Colapinto with	
CX 53 12/23/97	Complainant's Post-Hearing Brief Enclosed	
RX 55/55A 12/23/97	Letter dated December 22, 1997 from Attorney Leavitt with / Letter dated January 5, 1998 from Attorney Burnett with	
RX 56 12/23/97	Respondent's Post-Hearing Brief Enclosed	
RX 57 12/29/97*	Letter dated December 29, 1997 from Attorney Burnett with	
RX 58 12/29/97*	Objections to Dr. Carter's September 30, 1997 deposition enclosed	
RX 59 12/29/97*	Letter dated December 29, 1997 from Attorney Burnett regarding restricted access information	
CX 54 12/30/97*	Letter dated December 30, 1997 from Attorney Colapinto with	
CX 55 12/30/97*	Complainant's Response to Respondent's Objections to Dr. Carter's Deposition enclosed	
RX 60 12/31/97*	Letter dated December 31, 1997 from Attorney Burnett regarding Respondent's Reply Brief to Complainant's Request for Damages	

RX 61 12/31/97*	Letter dated December 31, 1998 from Attorney Burnett with	
RX 62 12/31/97*	Respondents' Reply to Complainant's Response to Respondents' Objections to Dr. Carter's Deposition enclosed	
RX 63 01/05/98*	Letter dated January 5, 1998 from Attorney Leavitt with	
RX 64 01/05/98*	Respondents' Response to the Remedy Section of Complainant's Post-Hearing Brief	
CX 56 01/05/98*	Letter dated January 5, 1998 from Attorney Colapinto regarding restricting access to part of Dr. Carter's deposition and Complainant's Post-Hearing Brief	

[Page 6]

RX 65 01/05/98*	Letter dated January 5, 1998 from Attorney Leavitt regarding Dr. Carter's deposition	
ALJ EX 95 01/08/98	Order Regarding Respondents' Post-Hearing Brief	
RX 66 01/09/98*	Letter dated January 9, 1998 from Attorney Leavitt clarifying Respondents' letter of January 5, 1998	
ALJ EX 96 03/10/98	Order Returning Exhibits that were not admitted into evidence at the hearing	

The record was closed on March 10, 1998, as no further documents were filed and no further orders were issued.

The parties stipulate (JX 1), and this Judge finds:

1. HL&P is an employer subject to the ERA.
2. On October 25, 1995, Respondents and Complainant executed a Settlement Agreement and Full and Final Release. (RX 10)
3. On December 4, 1995, the U.S. Secretary of Labor entered a Final Order approving the terms of the Settlement Agreement. (RX 14)

4. On December 6, 1995, Complainant resigned from his employment with HL&P.
5. On October 4, 1995, HL&P requested that Complainant submit to an independent medical examination as part of discovery in Thompson v. Houston Lighting & Power Co., Case Nos. 93-ERA-2 and 95-ERA-48.
6. HL&P designated Dr. Richard Coons and Dr. George Parker to perform the independent medical examination.
7. On October 11, 1995, Complainant provided HL&P with a copy of the test results of the diagnostic procedures administered by Dr. Carter during his psychological evaluation of the Complainant.

[Page 7]

8. On October 12, 1995, Drs. Coons and Parker performed an independent medical examination of the Complainant.
9. **Paragraph 5(f) of the Settlement Agreement provides that, "HL&P agrees to keep confidential Thompson's medical, security, unescorted access, and/or psychological records, including but not limited to documents related to Thompson's 'fitness for duty,' except as required by law or consented to by Thompson."**
10. On December 2, 1995, Complainant signed a "Notarized Authorization" addressed to Drs. Coons and Parker in which Complainant consented to the release of medical records, including any psychological tests, and notes of interviews and evaluations, to Dr. Edwin Carter. This release was sent to Dr. Parker and Attorney Leavitt sometime after January 12, 1996.
11. Dr. Carter wrote to Drs. Coons and Parker, in a letter dated January 12, 1996, requesting copies of any and all medical records, reports, and other data pertaining to Complainant's involvement with Drs. Coons and Parker.
12. Complainant is a former employee of HL&P and he began at South Texas Nuclear Project (hereinafter STNP) in February 1988. (TR 102-103)
13. There was an agreement as of October 6, 1995 that the evaluations done by Drs. Coons and Parker would be kept separate from any fitness-for-duty issues regarding Complainant's employment. (TR 155)

Summary of the Evidence

On October 25, 1995, the Complainant and the Respondents executed a Settlement Agreement and Full and Final Release in Houston, Texas. (CX 1/RX 10) The terms of the agreement provided that reference to HL&P was a collective reference to Houston Light & Power Co. (hereinafter HL&P), Houston Industries, Inc. (hereinafter HII), and any other affiliates or subsidiaries of HL&P. On December 4, 1995, the Secretary of Labor entered a Final Order Approving Settlement and Dismissing Complaints with prejudice. (RX 14) Paragraph 5(f) of the Agreement provides that, "HL&P agrees to keep confidential Thompson's medical, security, unescorted access, and/or psychological records, including but not limited to documents related to Thompson's 'fitness for duty,' except as required by law or consented to by Thompson."

Prior to execution of the Agreement and while the litigation collectively known as 93-ERA-2 and 95-ERA-48 was still pending,[3] Complainant indicated his intention to call Dr. Edwin Carter, a psychologist from

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[Page 8]

Springfield, Virginia, as a testifying expert. (TR 108, 295) Respondent responded by letter dated October 4, 1995 and requested that Complainant undergo an examination by Respondent's own psychologist. (CX 4) According to Attorney Helliker, Respondent decided to schedule the independent medical examination of Complainant because Dr. Carter was designated as an expert and Respondent needed to hire experts to investigate and prepare for any kind of testimony regarding the mental anguish, if any, Complainant had suffered. (TR 295, 311)

On October 12, 1995 Dr. Richard E. Coons and Dr. George Parker performed an evaluation of Complainant at the Holiday Inn in Bay City, Texas and subsequently drafted reports of this evaluation. Complainant understood that he was to undergo an evaluation and that the information was to be relayed back to Dr. Carter or Complainant's legal representatives for assessment. (TR 108) Complainant recalled the Doctors told him "they were hired as consultants by the law firm and associates to assess [Complainant] and prepare a report." (TR 111, 131) The Doctors made it clear to him that they were there on a consulting or professional basis for the law firm. (TR 136) According to Complainant, he specifically informed the Doctors, prior to and at the conclusion of the evaluation, that he expected the records of the evaluation to be provided to Dr. Carter. (TR 109, 111-112) Complainant wanted the records of Drs. Coons and Parker because he wanted to see their conclusions drawn from his evaluation.

The evaluation was begun with a history of Complainant's employment, symptoms and concerns, and then Dr. Parker performed a battery of psychological testing. Both Doctors prepared their respective reports of this evaluation and gave them to Attorney Leavitt.[4] Neither Doctors' report is in Complainant's personnel file and Attorney Helliker testified that, to her knowledge, no one at HL&P has ever seen the reports. (TR 305; ALJ EX 57, exh. 1, ans. 14 & 15)

By letter dated October 11, 1995 Complainant expressed his concern to Respondent about the anticipated length of the evaluation to be conducted by Respondent's doctors. (CX 7) Subsequent to the evaluation, Complainant sent Respondent another letter, dated October 12, 1995, objecting to the evaluation being done by two psychologists at one time. The letter states the evaluation was unorthodox and excessive. (CX 9) By letter addressed to Attorney Burnett, dated October 13, 1995, Complainant requested production of the diagnostic tests and results. (CX 10)

Also on October 13, 1995, Dr. Parker wrote Dr. Carter (CX 11) and indicated that he would be happy to oblige Complainant's request that Dr. Carter be supplied with a copy of certain answers upon receipt of a release authorization. Complainant testified that he

gave the release to his attorneys when he was given the letter from Dr. Parker to Dr. Carter. (TR 133) Complainant's authorization (CX 12) is dated December 2, 1995. Complainant has not had a conversation with Dr. Carter since November 7, 1995, except for one call regarding a billing inquiry.

On October 25, 1995, the parties entered into the Settlement Agreement, which was submitted to Judge Michael Lesniak under Joint Motion for Approval dated October 25, 1995.

[Page 9]

(CX 1/RX 11) Judge Lesniak approved the Settlement Agreement on that same day. (CX 1/RX 12) Throughout the negotiation and execution, Complainant was represented by qualified and capable counsel who are known in the industry for having a kind of specialized expertise in the area of whistleblower litigation. (TR 126) Attorney Helliker, whose testimony is later summarized, testified although there was a lot of bantering about terms of the agreement, the reports of Drs. Coons and Parker were never mentioned. (TR 308, 309) According to Complainant, if the issue of the Doctors' evaluation was thought of, it would have been included in the agreement. (TR 129)

Complainant, who admits to entering into the Settlement Agreement after the evaluation, testified it remained his understanding that the evaluation records would be turned over to Dr. Carter. According to Complainant, paragraph 5(f) agrees to keep confidential every record that Respondents obtained about Complainant and his employment with Respondents and that Complainant would have to give his consent for release of information. Complainant's interpretation of paragraph 5(f) is that "[Respondents] would keep confidential every record that they obtained about [Complainant] and [his] employment with them and the fitness-for-duty issues involved in it, and that [Complainant] would have to give consent to anyone to release that information or accept (sic) that as required by law, of course. [Complainant] should know of all the documents relating to [him], [his] cases or this case or any other case in [his] employment with [Respondents]."[5] (TR 115, 130) Complainant agreed to that term because he did not want his records being sent out without his knowledge or control or without his ever having seen them. Although Complainant has not applied for any employment since leaving HL&P (TR 144-145), he claims that the evaluation of Drs. Coons and Parker might effect his ability to go to work for another nuclear power plant.

Dr. Carter wrote both Dr. Parker (CX 13/RX 17) and Dr. Coons (CX 14/RX 16) on January 12, 1996 and requested a copy of medical records, reports, and data concerning Complainant. The Doctor also expressed a willingness to discuss Complainant with Dr. Parker in order that Dr. Parker could provide a "clear picture" of Complainant's circumstances. Dr. Parker responded by letter dated January 19, 1996 and stated that he would be glad to communicate about Complainant. (CX 15/RX 18)

A January 23, 1996 letter from Dr. Carter to Attorney Colapinto stated that the Doctor was having a "tough time" getting medical documentation concerning Complainant. (CX 16) The letter also noted that Dr. Parker seemed quite willing to talk, but at the last minute he canceled upon advice. Assumedly, this is a reference to Dr. Parker's letter to Dr. Carter, also dated January 23, 1996, which states he was advised not to release records or communicate with Dr. Carter regarding the case. (CX 17)

Attorney Colapinto recounted Dr. Carter's efforts to obtain the above-specified information and again requested release of the medical documents in a letter dated January 29, 1996 to Attorney Leavitt. (CX 18) Attorney Colapinto wrote "It is our position that under state and federal law, and the settlement agreement entered into between Mr. Thompson and HL&P, Mr. Thompson has a right to obtain these records."

[Page 10]

Attorney Leavitt responded on January 31, 1996 and stated the Respondents' position that Drs. Coons and Parker evaluated Complainant in order to provide rebuttal testimony at the damages stage of the hearing, which stage was never reached because Judge Lesniak bifurcated the proceeding on October 16, 1995; the Respondents' position that the documents were subject to the attorney work product privilege and that Complainant waived any right to an objection by failing to file a motion to compel; and that the issue was moot because of the Secretary's Final Decision approving the Settlement Agreement and Dismissing the Complaint with prejudice. Furthermore, Respondents contended the documents did not come within the ambit of paragraph 5(f) of the Settlement Agreement because they were work product. Respondents, maintaining that the documents continued to be privileged, invited a citation to authority. (CX 19) Without further communication between the two attorneys, on February 29, 1996, Dr. Parker wrote to Dr. Carter and indicated he could talk about Complainant with Dr. Carter. (CX 20)

Dr. Richard E. Coons, whose impressive credentials are thoroughly summarized in his curriculum vitae (RX 51), has earned a doctor of jurisprudence and a doctor of medicine degree, is board certified in general psychiatry and has a general practice in the diagnosis and treatment of nervous and mental disorders. He also has a subspecialty of forensic psychiatry, which deals with the evaluation of cases or individuals to give opinions for legal or administrative purposes.[6] The Doctor was certified by this Judge to render his expert opinion on forensic psychiatry, independent medical examinations, and the ethical obligations of a forensic psychiatrist.

Dr. Coons, who had worked with the Respondents' representing law firm in the past,[7] recalled being contacted by Attorney Leavitt in regards to an impending hearing and the need for the Doctor's opinion based upon an evaluation as to whether or not Complainant's mental or emotional injury, if any, might have been caused by his employment. The purpose of the evaluation was to assess the damages that Complainant was claiming in the then pending litigation. (TR 165) The Doctor has performed these sorts of evaluations for the law firm for the past 15 or 20 years, as well as for other law

firms and the State of Texas. Prior to October 1995, however, Dr. Coons had never done any evaluations for any HL&P employee or any employee in the nuclear industry.

Dr. Coons testified Complainant's evaluation was a forensic evaluation, which is the type of evaluation done in both civil and criminal cases for the purpose of rendering an opinion or for a legal purpose regarding an emotional injury. He is careful to distinguish this from a clinical evaluation, done for the purpose of diagnosis and treatment or recommending treatment of a nervous or mental disorder.[8] A forensic evaluation is not done for the purpose of treatment and there is no doctor-patient relationship, which Dr. Coons described as "antithetical" to a forensic evaluation. (TR 167-168) The Doctor referred to Complainant as the evaluee, as opposed to the patient. A further distinguishing characteristic between a forensic evaluation and a clinical examination is that the Doctor would not have written a report if Complainant was his clinical patient. (TR 198)

[Page 11]

Dr. Coons was not privy to any conversation where Complainant requested that he be provided with any information. Dr. Coons understands, from Dr. Parker, that Complainant asked him to supply his testing data to Dr. Carter. Complainant did not condition the evaluation on being provided the information. (TR 179) Dr. Coons stated he would not perform the evaluation under those conditions because his ethical obligation in terms of the data and its release would be to the law firm. In this regard, Dr. Coons reviewed paragraph 5(f) of the Settlement Agreement and stated that his notes and/or his reports are not Complainant's records and do not fit into the category of documents identified in that paragraph. (TR 181-182)

Prior to the January 12, 1996 letter from Dr. Carter (CX 14/RX 16), Dr. Coons had not received any correspondence, communications or phone calls from Dr. Carter, Complainant, or Complainant's attorneys. (TR 171) Upon receiving the letter, Drs. Coons and Parker agreed that Dr. Parker would be the one to contact Dr. Carter because he and Dr. Carter were both psychologists. Dr. Coons stated it is unusual to receive a request for information like this, at a time when a case had been settled. The Doctor then spoke with Attorney Leavitt, who indicated that he did not believe Complainant was entitled to the data and that he would get back to the Doctor. Dr. Coons was aware that Dr. Parker had agreed to confer with and provide records to Dr. Carter about the results of the evaluation. Dr. Coons then recalled Dr. Parker informing him that he had spoken with Dr. Carter and that Dr. Carter was satisfied. (TR 174-175)

Dr. Coons was later informed of the law suit concerning the evaluation data. The Doctor was unable to find a file on Complainant because his file on Complainant had been "shredded and jettisoned." (TR 176) Dr. Coons disagreed with Dr. Carter's deposition testimony that Dr. Coons had an ethical duty to talk to Dr. Carter regarding Complainant, and described the concept as fundamentally flawed in that Dr. Carter makes the assumption that Dr. Coons performed services for Complainant and that there was a doctor-patient relationship. (TR 177, 197) Again, Dr. Coons pointed out that the role of a

forensic evaluator is to report to whoever asks him to do the evaluation. The opinions are then subject to the discovery process. His ethical duty, however, would be to the law firm in terms of the data and it would not be the Doctor's choice as to whether or not he should release the information.[9] The Doctor would need to be instructed to release or allowed to release that information.[10] He also disagreed with Dr. Carter's testimony that it is customary for doctors to consult with one another on a particular person because this is not a doctor-patient relationship.

Dr. George Parker, whose curriculum vitae demonstrates his extensive credentials in the psychiatric field (RX 52), is a general practitioner who also does forensic work. Dr. Parker was certified at hearing as an expert in his field and specialty and he testified he has worked for Respondents' law firm on five or six previous occasions. Dr. Parker similarly described the difference between his clinical work and his forensic work, the latter of which he described as referrals by judges or attorneys. Dr. Parker testified he never had a doctor-patient relationship with

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[Page 12]

Complainant. It was a professional, forensic relationship. (TR 222-223) The Doctor was retained by the Respondents' representing law firm on or about October 5, 1995, to consult and to perform an evaluation of Complainant in terms of his personality make-up and what problems he may or may not have related to some events or some experiences on the job. It was the Doctor's understanding that a hearing was impending. Dr. Parker provided his opinion orally and later reduced it to writing during the previous litigation and his entire file has been produced in the course of this litigation. According to Dr. Parker, Dr. Coons did not have any of the testing data on Complainant. (TR 248)

Dr. Parker testified Complainant was not a patient of his, he was not caring for him, and he provided no clinical service for him. He simply evaluated Complainant to see if he had a mental or emotional condition or disorder. (TR 232) It was what the Doctor knows as an independent medical examination and was a forensic evaluation as part of a lawsuit, for which the bill was sent to Attorney Leavitt, who remitted payment. Attorney Leavitt never paid Dr. Parker to render psychological advice or medical advice to Complainant. According to Dr. Parker, although he personally has no problem sharing the information with Dr. Carter, it was not a clinical situation and he was absolutely not a mental health provider for Complainant. (TR 253)

The battery of tests that Dr. Parker performed on Complainant at Attorney Leavitt's request are routinely performed examinations.[11] Dr. Parker did not remember any demands prior to the evaluation. Specifically, he did not recall Complainant demanding data and notes as a pre-condition to the evaluation. (TR 215) Dr. Parker did, however, recall that Complainant requested that the data be sent to Dr. Carter at the end of the evaluation. (TR 216) Dr. Parker followed up with that oral request by a letter to Dr. Carter dated October 13, 1995, which letter states that he would be happy to oblige releasing Complainant's answers to the tests performed if Dr. Carter would forward a

release. (CX 11) Dr. Parker did not discuss this letter with anyone at the law firm prior to sending it and he had no concerns about talking with or sharing information with Dr. Carter until he spoke with Attorney Leavitt in January 1996. (TR 241) It should be noted that at the time Dr. Parker wrote the letter, the hearing of 93-ERA-2 and 95-ERA-48 was impending and, according to Dr. Parker, it is standard and customary to provide testing data or reports to the opposing side when you are about to testify in a hearing. (TR 217) After sending the letter to Dr. Carter, Dr. Parker did not receive the requested release prior to the case being settled.

Dr. Parker, who was not familiar with the DOL rules concerning an independent medical examination, testified that the APA Code of Ethics requires a psychologist who is conducting a forensic test to be familiar with laws and rules governing evaluations and requires that data be saved for three years or longer. (TR 236-237) The Code provides that forensic testing is to be conducted in a manner that is consistent with the provisions governing clinical evaluations. Dr. Parker agreed that psychometrics[12] are administered in standardized form, which is the same regardless of whether it is a clinical or forensic evaluation. (TR 238)

[Page 13]

The APA Code does not require Dr. Parker to provide an individual that has been forensically evaluated a copy of their testing data and report. (TR 228) In Dr. Parker's opinion, the records belong to the doctor who performed the evaluation and the attorney or court who hired the Doctor. Dr. Parker merely waits for a judge to determine whether or not his reports are discoverable. Dr. Parker testified he reviewed the Settlement Agreement twice prior to hearing and that nothing in there, that he saw, required him to provide records or data regarding an individual's forensic evaluation. (TR 246-247)

Several months after the evaluation, Dr. Parker received a request, dated January 12, 1996, for his data. (CX 13/RX 17) That letter was accompanied by a release (CX 12), which Dr. Parker described as kind of confusing because of its language. It is, however, procedure for Dr. Parker to have someone who has seen him execute a release and statute requires providers to release information within a certain number of days once it is requested. (TR 251) Dr. Parker responded by letter dated January 19, 1996 and stated he would be glad to communicate in regards to Complainant. (CX 15/RX 18) After writing that letter, Dr. Parker spoke with Attorney Leavitt for direction as to what he should do, and Attorney Leavitt told the Doctor he would have to get back to him. Dr. Parker apprized Dr. Carter of this in a letter dated January 23, 1996. (CX 17) Attorney Leavitt eventually got back to Dr. Parker and told him that he could talk about Complainant with Dr. Carter. Dr. Parker so advised Dr. Carter by letter dated February 29, 1996. (CX 20)

Dr. Parker and Dr. Carter spoke in early March 1996 and Dr. Parker made notes in preparation for that meeting because it had been sometime since his evaluation of Complainant. Dr. Parker described the conversation as professional, friendly, collegial, useful and productive.[13] (TR 224) The call ended with Dr. Carter appearing pleased and

satisfied with the information he sought and obtained. At the conclusion of the call, Dr. Parker offered to send the psychometrics[14] and Dr. Carter indicated he did not need them, that he concurred with Dr. Parker's impressions, findings and opinions, and that he would get back to Dr. Parker if he decided he did need them. (TR 226-227) Without hearing any more from Dr. Carter, Complainant, or Complainant's counsel, Dr. Parker was informed that there was a lawsuit. According to Dr. Parker, Dr. Carter could have called him back and asked for more information.

Dr. Edwin N. Carter, whose testimony was submitted in deposition form (CX 49; CX 50) and whose credentials are summarized in his curriculum vitae (CX 21), is a clinical psychologist of twenty-two years who practices in Virginia. One of Dr. Carter's specialties is in employee-employer relations. In prior litigation, he has been qualified as an expert in psychology generally and as an expert in regards to the standard of care in the psychological profession. The Doctor testified that one may or may not want to look at the records of another professional when rendering treatment to a patient. Generally, however, it is something that is routinely done. According to Dr. Carter, it is "customary" in the profession for doctors to consult about the condition of a person who has been tested, treated or evaluated by them. (CX 49, at p. 35)

Dr. Carter has known Complainant since March of 1995, when he first evaluated him and provided some therapeutic services. Presently, Dr. Carter is merely a consultant on the case. Dr. Carter was informed that Respondent HL&P intended to have Complainant submit to an independent medical examination and Dr. Carter requested, through Complainant, that he be supplied with any data. This was confirmed by Dr. Parker's mid-October letter, in which Dr. Parker wrote that such an arrangement would be fine with him if he was supplied the proper authorization forms. Dr. Carter states that once he received this letter, he contacted Attorney Colapinto "within a day or so." (CX 49, at p. 25) Dr. Carter "just thought it was the right thing" for Dr. Parker to share the information and that it was in the interest of coordination of care and services to present a unified position to the patient. (CX 49, at pp. 26-28) Dr. Carter was unaware, as late as December of 1995, that the litigation was no longer pending.

Dr. Carter wrote his January 12, 1996 letter to Dr. Parker to stress that the two should share information and that Dr. Parker's "records and notes are probably secondary, in my opinion, to actually being able to talk" directly about the patient. (CX 49, at pp. 30-31) Dr. Carter generally agreed with Dr. Parker's impressions of the telephone call and, describing it as "very productive" and "helpful" (CX 49, at p. 36; p. 142), he stated there was no quarrel between the two of them when they hung up the telephone. (CX 50, at p. 45) Dr. Carter concluded the call feeling "pretty satisfied." (CX 49, at p. 72) He also felt that there would be no problem in getting the report. (CX 50, at p. 45; CX 49, at pp. 38, 40, 41) Dr. Carter felt that if he had anything he needed to discuss with Dr. Parker and/or Dr. Coons, he was at liberty to do so. Nevertheless, it was the Doctor's testimony that it

did not occur to him to call Dr. Parker a week or two later when he did not receive the reports.

According to Dr. Carter, there was no specific discussion regarding Dr. Parker's records concerning Complainant during the March 1996 conversation. In this regard, Dr. Carter stated that he never told Dr. Parker that he did not need the records. (CX 50, at p. 11) The Doctor intended to get the information so that he could provide Complainant and his counsel with his opinion regarding Complainant's functioning level and to render advice with respect to the implications of the information being in existence in personnel files or "wherever it might be."[15] Dr. Carter made only a brief notation of the March 5, 1996, telephone conversation, but testified that the conversation covered issues such as his findings, Dr. Coons' findings and the evaluation of Complainant. It did not occur to Dr. Carter to ask Dr. Parker for the data during their telephone call because there was no issue on the data at that point.[16] In this regard, the Doctor repeatedly referred to his "presumption" that the reports would be forthcoming. (CX 50, at pp. 6, 44)

The telephone conversation left Dr. Carter with the impression that there was only a minor difference between the opinions of the two professionals. (CX 49, at p. 142) Dr. Carter felt there was no emergency need for the records because the doctors were "all kind of basically saying the same thing" (CX 49, at p. 38), Drs. Carter and Parker agreeing as to Complainant's condition and as to what would be best for him in the future. After the telephone

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conversation, Dr. Carter did not appreciate the full implication of some specifics of the Doctors' respective opinions. Upon seeing the verbiage in the report, however, Dr. Carter was "a little concerned." (CX 49, at p. 143, 180) Basically, the data supports Dr. Carter's diagnosis, despite the reports of Drs. Coons and Parker to the contrary. This would have effected Dr. Carter's advice to settle the case. (CX 49, at pp. 43-45, 78-82)

Dr. Carter believes the records should have been released according to the standard of care of professional clinical psychologists. (CX 49, at pp. 42-43) According to Dr. Carter, the APA Code obligated Drs. Coons and Parker to give Complainant the data. Nothing in the forensic section of the Code changes that obligation. In his opinion, the tests were standard psychological tests that Dr. Carter would also be able to administer to Complainant. (CX 49, at pp. 51, 53, 54, 55, 56, 134-35, 136) Indeed, he calls Dr. Coons' report and Dr. Parker's report, both written to Attorney Leavitt, a "standard type of report written by psychologists." (CX 49, at pp. 58-59) If Dr. Carter had been shown Respondents' letter inviting citation to authority, Dr. Carter would have advised Attorney Colapinto of that authority right away. (CX 49, at p. 202-203) It is a fact, though, that Dr. Carter, when put in a similar situation himself, would probably act just as Dr. Parker did. (CX 49, at pp. 198-199)

Dr. Carter testified that it is the exception that he considers himself to be hired by a law firm when he is retained as an expert. (CX 49, at p. 91) Usually, he is hired by the patient. In the cases where he has been hired by the law firm under a retainer agreement, Dr. Carter has understood that he was under an obligation to keep the communications strictly confidential. (CX 49, at pp. 93-94) Dr. Carter understands the difference between the two relationships and has been informed, in the week prior to his deposition, that Drs. Coons and Parker were hired by the law firm in conjunction with the previous litigation. (CX 49, at p. 94) Dr. Carter does not, however, see a distinction between a forensic expert as opposed to a treating physician. He stated that "what makes it forensic is when someone asks you to come forward and talk about your patient in some sort of way." (CX 49, at p. 102) In Dr. Carter's opinion, any time a doctor does an evaluation of an individual, that individual is the doctor's patient. It is the nature of the services provided and not who ultimately pays for those services that determines whether or not it is a doctor-patient relationship. (CX 49, at p. 103)

In Dr. Carter's opinion, Drs. Coons and Parker "were conducting health care procedures, conducting psychological, psychiatric evaluations of an individual...and they were clearly providing that service to" Complainant. (CX 49, at p. 222) It does not much matter whether the Doctors were performing an independent medical examination or working for Attorney Leavitt. (CX 49, at p. 231)

Attorney Carol Ruth Helliker, who is employed by HII as an in-house labor attorney, also testified at hearing. Attorney Helliker gave her consent to Attorney Leavitt to send the January 31, 1996 letter (CX 19), which represents Respondents' position that the reports and information referred to were considered privileged attorney work product.[17] Attorney Helliker, who was aware of

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Complainant's discovery request for the information but who never produced it because it became a moot issue, stated she had concerns about releasing the evaluation documents after the Settlement Agreement had been executed and that she was certainly open to discussion on the issue. Accordingly, the letter does not refuse to turn over the documents under any circumstances. (TR 302) She gave her consent after having read Complainant's January 29, 1996 letter (CX 18) and with full knowledge that the information sought was probably going to be produced during the prior litigation. At the time of giving her consent, Attorney Helliker was also aware that Complainant had raised concerns about the validity of the Settlement Agreement to the NRC by letter dated January 4, 1996, which the Respondent HL&P received from the NRC on January 9, 1996. (CX 3; ALJ EX 46, ans. 4)

It was also on January 29, 1996 that Attorney Helliker received a letter from Complainant's counsel regarding an issue as to Complainant's medical benefits which were addressed by the Settlement Agreement.[18] Attorney Helliker, in discussing both letters with Attorneys Leavitt and Burnett, raised her concerns that "once again,

[Complainant] was backing out of another settlement agreement. He'd backed out of two others. It was a very unusual situation....I was just afraid if we just produced them and were in future litigation with [Complainant] that we would have waived [any applicable privileges]." (TR 301-302)

The testimony reflects that Attorney Helliker is familiar with the rule that a party to litigation which claims a privilege has the burden of proving the existence and applicability of the privilege. It is pointed out that there is no citation to legal authority either in the January 31 letter or at the relevant part of Respondents' Response to Complainant's Motion to Compel, dated April 18, 1997. (ALJ EX 63) Attorney Helliker responded, however, that when she signed the letter, which was sometime before January 31, 1996 (TR 300), the litigation was concluded. Therefore, the January 31 letter did not have to make any legal argument because the parties were not engaged in litigation at the time.

Attorney Helliker gave her opinion that an expert's evaluation is covered as privileged work product under the Texas Rules of Evidence and that there is a difference between testifying and consulting experts under Texas law and the Federal Rules. (TR 306-307) The report of an expert who is anticipated to testify, but then only consults, is not discoverable. Attorney Helliker considered Drs. Coons and Parker to be consulting experts only.

Attorney Helliker discussed the letters from Complainant with Attorneys Leavitt and Burnett and expressed her concerns that Complainant was once again attempting to back out of a settlement agreement.[19] (TR 301, 312) She had never had a similar request for information submitted after a case had settled and was concerned about work product, attorney-client privilege and the possible repercussion of turning those documents over at that time if indeed there was going to be subsequent litigation. There was also a reference to a complaint of malpractice raised because of the presence of two doctors at the evaluation.[20]

Attorney Helliker stated she was not retaliating against Complainant when she authorized sending the January 31 letter. (TR 303) She has, in the past, seen documents that would be damaging to her client in a lawsuit. She has settled cases because of those documents and has not sent the other side a copy of the documents after settlement because there is no reason to do so. (TR 304)

Preliminary Issue of Jurisdiction

Complainant has named as a Respondent in this action Houston Industries, Incorporated. HII, a publicly traded company, is the parent of HL&P, which is not publicly traded and which is a wholly owned subsidiary. Although incorporated in the same state, the corporations have distinct business and mailing addresses and Internal

Revenue Service numbers. (CX 31) In 1995-1996, HL&P's business and operations accounted for substantially all of HI's income from continuing operations and common stock equity.

On the one hand, Complainant considered himself an employee of HL&P and HII when he worked at STNP because HII handled all his benefits and health care. In this regard, Complainant's health card reflects HII as his employer. (CX 33) In Complainant's words, HL&P and HII were all the same to him. (TR 122, 134) Furthermore, STNP management reported to the CEO of HII on the organizational charts. (TR 119-120) On the other hand, Complainant never drew a paycheck from HII and he does not know what role the CEO of HII held with HL&P. (TR 121; ALJ EX 46)

HII is the sponsor and plan administrator of the retirement plan and savings plan to which HL&P is a participating employer. (TR 287) HII sends out annual reports to all employees who participate in those benefit plans. The 1989 Report of Welfare Benefits begins with a salutation from Mr. Jordan and is addressed "Dear Fellow Employee." (TR 288)

Mr. William Collo is the group-vice president of nuclear at STNP and was, at the relevant time, vice president of HL&P. Mr. Collo reported to Mr. Donald Jordan, who was chairman and CEO of HL&P. Mr. Jordan is also the chairman and CEO of HII. (TR 284) Attorney Helliker, who is an employee of HII, was a member of the employee concerns oversight group at STNP in 1995-1996.[21] (TR 284-285) She states, however, that she was not on the committee as a representative of HII. STNP merely needed someone with labor law experience and she had it. In her capacity at HII, Attorney Helliker provided legal services to subsidiaries. (TR 285, 297)

The HII Board of Directors and HL&P held sixteen and twelve meetings, respectively, during 1995.[22] (CX 32) HII has a total of six executive officers and HL&P has nine executive officers. (CX 31) Four of the HII

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officers were also officers at HL&P. In 1995, each member of the Board of Directors of HL&P was also a member of the Board of HII. (TR 291; CX 31) All members of HI's Nuclear Committee are members of the HII Board of Directors and STNP is the only nuclear activity of HII. (TR 291-292) The Nuclear Committee reviews the activities of HII and HL&P in all areas of nuclear development and operations and reports to and makes recommendations to the Board of Directors. (TR 292-293; CX 32) HII provides executive compensation and benefits to senior management at STNP. (CX 32)

Complainant argues HII is a properly named party because it was a party to the Settlement Agreement. The preamble of the Agreement provided that any reference in the Agreement to HL&P was a collective reference to HL&P "or its parent company, Houston Industries, or any other affiliates or subsidiaries" of HL&P. (RX 10, at pp. 1-2)

Even if HII submitted to the jurisdiction of the Secretary/Administrative Review Board, and **a fortiori** the Office of Administrative Law Judges, by signing the agreement, it does not render it capable of being held *liable* under the ERA. This submission merely renders HII within the jurisdictional reach of these administrative bodies. For example, in **Macktal v. Secretary of Labor**, 923 F.2d 1150 (5th Cir. 1991), the respondent was deemed to have submitted to the jurisdiction of the Secretary by submitting a joint motion for approval of a settlement agreement. A determination of *liability*, however, is another matter.

A finding of liability under the ERA nevertheless requires that the respondent be an "employer" as defined by the Act. Because HII is not within any of the categories specifically enumerated by the Act, **see Saporito v. Florida Power & Light Co.**, 94-ERA-35 (ARB 7/19/96) (construing 42 U.S.C. 5851(a)(2)(A-D), Complainant can only hold HII liable if it is considered a single employer or if it acted as Complainant's employer. **See Generally Richard v. Bell Atlantic**, 976 F. Supp. 40 (D. D.C. 1997) (denying parent company's motion to dismiss or for summary judgment on the basis that even if the parent could not be held liable under the integrated enterprise test, it could, at the very least, be held liable for its role in developing and implementing a discriminatory procedure). Although the evidence of record may not be sufficient to establish that HL&P and HII should be considered a single employer, it is sufficient to establish that HII acted as Complainant's employer through the acts of Attorney Helliker.

Absent special circumstances, a parent corporation is not responsible for a subsidiary's violations of law. **Ishamel v. Calibur Systems, Inc.**, 96-SWD-2 (ALJ 6/23/97) (Citations Omitted). In **Ishmael**, Administrative Law Judge Campbell noted that neither the Administrative Review Board's Decision and Remand Order nor the Administrative Law Judge's Recommended Decision in **Varnadore v. Oak Ridge Nat'l Lab.**, 92-CAA-2/5, 93-CAA-1, 94-CAA-2/3, 95-ERA-1 (ARB 6/14/96), 95-ERA-1 (ALJ 9/20/96), indicated any test that would determine when a parent company was not "merely a parent" and was to be

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considered as one with the subsidiary.[23] 96-SWD-2, at p. 16-17. The **Varnadore** decision, however, in turn relies upon the case of **Armbruster v. Quinn**, 711 F.2d 1332, 1337 (6th Cir. 1983), which applied the four part test as enunciated by the National Labor Relations Board and approved by the Supreme Court. This tests considers the degree of interrelated operations, common management, centralized control of labor relations, and common ownership. **See Also Garcia v. Elf Atochem North America**, 28 F.3d 446, 450 (5th Cir. 1994) (applying the four factors test and concluding that the parent and subsidiary were not a single employer). The separate corporate entities of two corporations may not be disregarded merely because one owns the stock of another or because the two share common directors. **Bright v. Roadway Services, Inc.**, 846 F. Supp. 693, 700 (N.D. Ill. 1994) (**quoting Sumner Realty Co. v. Willcott**, 499 N.E.2d 554, 557 (5th Dist. 1986), **appeal denied**, 505 N.E.2d 362 (1987)).

Complainant, the party upon whom the burden rests, has failed to present sufficient facts for this Judge to find that HII and HL&P are a single employer. In this regard, Complainant's conclusory testimony that HII and HL&P were all the same to him is of little evidentiary value. So too is the fact that HII was the sponsor and/or administrator of certain employee benefit plans. Similarly unpersuasive is the fact that HL&P accounted for substantially all of HI's income from continuing operations and common stock equity. This is not a case where the subsidiary is grossly undercapitalized.

In support of his argument, Complainant stresses it is "uncontested that HII has control over HL&P and HL&P's nuclear operations at STNP." (CX 53, at p. 26) To the contrary, the evidence establishes a nuclear oversight committee which was responsible for issuing *recommendations* to the *Board of Directors*.

While factors such as HI's rendering compensation to senior STNP officers and Attorney Helliker's designation as corporate representative for both HII and HL&P and her role on the employee concerns oversight group militate in favor of a finding that HII and HL&P are a single employer, the evidence, when taken as a whole, simply does not rise to a level sufficient to establish that HII exercised control over HL&P that exceeds the control normally exercised by a parent corporation which is separate and distinct from the subsidiary. **Kellett v. Glaxo Enterprises, Inc.**, 1994 WL 669975 (S.D. N.Y. 1994) (**quoting Armbruster**, 713 F.2d at 1338). These factors, without more, merely reveal a parent that took an active interest in the affairs of its subsidiary.

A parent company acts in the capacity of an employer by establishing, modifying, or otherwise interfering with an employee of a subordinate company regarding the employee's compensation, terms, conditions or privileges of employment. **Stephenson v. National Aeronautics & Space Admin.**, 94-TSC-5 (ARB 2/13/97), **aff'd**, (ARB 4/7/97). By way of example, the Administrative Review Board has stated the president of a parent company who hires, fires or disciplines an employee of one of its subsidiaries may be deemed an "employer" for purposes of the whistleblower provisions. **Id.** at p. 3.

[Page 20]

HII, through the acts of Attorney Helliker, has acted as Complainant's employer. Attorney Helliker specifically testified that she participated in, or at least acquiesced in, the determination not to provide the records of Drs. Coons and Parker despite the consent of Complainant and the request of Dr. Carter. It was Complainant's position that Respondents were obligated to comply with this request pursuant to the Settlement Agreement, which agreement clearly related to Complainant's past employment. **See Generally** ALJ EX 43, at p. 10 (**citing Connecticut Light & Power v. Secretary of Labor**, 85 F.3d 89 (2d Cir. 1996) (holding that the settlement agreement was an attempt to resolve the final terms of complainant's employment and that respondent's argument to the contrary was "specious")). Accordingly, HII has acted as Complainant's employer with regards to the final terms of Complainant's employment.

Discussion

Clearly, Complainant engaged in protected activity when he filed previous complaints pursuant to the ERA. **Smith v. Esicorp, Inc.**, 93-ERA-16 (Sec'y 3/13/96); **Bryant v. EBASCO Serv. Inc.**, 88-ERA-31 (Sec'y 4/21/94); **Thompson v. TVA**, 89-ERA-14 (Sec'y 7/19/93); **McCafferty v. Centerior Energy**, 96-ERA-6 (ARB 9/24/97). While Respondents urge this Judge decline to infer retaliatory animus from those filings because they were too remote in time, I decline to draw the inference because those filings would be covered by the October 25, 1995 Settlement Agreement. Complainant did, however, engage in protected activity when he expressed concerns to the NRC about the terms of the Settlement Agreement because his concerns, it was evident from the NRC's letter of January 4, 1996 (CX 3), related to compliance with NRC regulations governing the suspension of unescorted access to protected or vital areas of nuclear power reactors. **See Generally Delcore v. W.J. Barney Corp.**, 89-ERA-38 (Sec'y 4/19/95), **aff'd sub nom. Connecticut Light & Power Co. v. Sec'y of Labor**, 85 F.3d 89 (2d Cir. 1996) (finding a violation of the ERA in the gag provision of a settlement offer). **Cf. High v. Lockheed Martin Energy Systems, Inc.**, 97-CAA-3 (ARB 11/13/97) (dismissing complaint on the basis that complainant failed to allege that a settlement term insisted upon by respondents would curtail complainant's rights under the whistleblower provisions).[24] This Judge remains unconvinced by Respondents' arguments to the contrary. (**See Generally** RX 56, at pp. 28-31) Moreover, the testimony of Attorney Helliker establishes that in January 1996 Respondents believed Complainant was engaged in protected activity in that he was about to commence further litigation concerning the Settlement Agreement or was about to pursue other rights protected under the ERA. There is no dispute that Respondents had knowledge about these protected activities.

The parties disagree as to whether or not Complainant has satisfied his burden of proving adverse action. Respondents contend Complainant was not otherwise discriminated

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against with respect to his compensation, terms, conditions or privileges of employment because the Settlement Agreement was not breached. This invokes the threshold inquiry of precisely what is required by paragraph 5(f) of the Settlement Agreement and whether or not Respondents failed to abide by that term. Respondents, of course, argue that there has been no breach on the grounds that they were not contractually obligated to give Complainant any records upon his consent and request by Dr. Carter; the expert reports and information from the Doctors are not "Thompson's records" as referenced in paragraph 5(f); and Dr. Parker offered to give Dr. Carter the expert reports.

Complainant contends Respondents acted adversely against him by breaching the terms of the Settlement Agreement. In this regard, Complainant maintains that the records of Drs. Coons and Parker are well within the scope of paragraph 5(f) and that Respondents violated that provision by refusing to produce the records upon Complainant's consent

and, by failing to consider the records as medical or psychological records, Respondents violated 5(f) which requires that such records be kept confidential. Complainant also alleges Respondents acted adversely by interfering with Complainant's attempt to obtain the records from Dr. Parker.

While the parties generally agree to the principles of contract interpretation which are applicable in the instant case, they vehemently disagree as to the result commissioned by that analysis. Respondents insist that the reference to Complainant's medical and psychological records is ambiguous and, therefore, properly considered in light of the testimony from Drs. Coons and Parker distinguishing clinical examinations from forensic evaluations. I disagree.[25]

There is nothing ambiguous about the blanket reference to Complainant's medical and psychological records. The failure to include more express language of the parties' intent does not create an ambiguity where only one reasonable interpretation exists. **Tarrant Distributors Inc., v. Heublein Inc.**, 127 F.3d 375 (5th Cir. 1997) (citation omitted). Dr. Parker, Dr. Coons and Dr. Carter all agreed that the withheld records included standard psychological tests taken by Complainant. (TR 214-215, 238; TR 168, 198; CX 49, pp. 50-60). The tests administered by Drs. Coons and Parker are Complainant's medical and/or psychological records, even if the Doctors cannot agree that they are records of Complainant as a "patient." Accordingly, Respondents' attempt to remove the records from the all-encompassing sphere of "medical and/or psychological records" by focusing on the purpose as to why those documents were generated, i.e., for litigation purposes, is rejected.[26] Texas courts do not draft new contracts for parties who fail to provide for themselves. **Sid Richardson Co. v. Interenergy Resources Ltd.**, 99 F.3d 746, 754 (5th Cir. 1996). Neither will this Administrative Law Judge.

It is another matter, however, as to whether or not the Doctors' reports generated from this data were "Thompson's medical...and/or psychological records." Both of the Doctors' reports were prepared for Respondents' attorneys to provide their respective

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professional opinions concerning Complainant and furnish each Doctors' findings and conclusions based on their evaluation of Complainant. In this regard, these reports were not Complainant's medical and/or psychological records. The reports were expert reports prepared for opposing counsel in the context of litigation. The ownership of these reports is implicitly acknowledged by Federal Rule of Civil Procedure 35, which balances the Complainant's privacy interest with the interest of the party seeking the examination, the judicial system, and society as a whole in arriving at the truth of the matter. In return for submitting to the examination, the examined person is entitled to make use of the report which results from the examination. **House v. Combined Ins. Co. of America**, 168 F.R.D. 236, 244 (N.D. Iowa 1996). The Rule ensures that the party to whom the report belongs turns it over to the party upon whom the examination was conducted.

Accordingly, I find and conclude that the reports generated by Drs. Coons and Parker are not within the ambit of paragraph 5(f).

It is another matter, however, to conclude that paragraph 5(f) *compelled* Respondents to disclose this information upon Complainant's consent. As previously noted, the confidentiality agreement required Respondents to hold the medical and/or psychological records confidential unless required by law or consented to by Complainant. In other words, Respondents promised not to disclose the records unless one of two exceptions was applicable. Neither party contends that the required by law exception is applicable to the instant facts. It is the "consented to by" Complainant language that Respondents stress permits disclosure, but does not require it. (RX 56, pp. 17-18)

I agree with Respondents. To hold otherwise would be to hold that this confidentiality agreement created a promise to produce documents upon Complainant's consent and, inferentially, the provision would constitute a waiver of any objection to such production that Respondents might be otherwise entitled to raise. In order for a court to read additional provisions into a contract, the implication must clearly arise from the language used, or be indispensable to effectuate the intent of the parties. It must appear that the implication was so clearly contemplated by the parties that they deemed it unnecessary to express it. **Fuller v. Phillips Petroleum Co.**, 872 F.2d 655, 658 (5th Cir. 1989) (quotation omitted).

No such clarity is present in this case. In this regard, I note the posture of the previous litigation at the time the Settlement Agreement was executed: Complainant had filed a Request to Produce the records and Respondents had not done so.[27] Even assuming that Respondents' lack of an objection to production of the information[28] led Complainant to the incorrect assumption that the information was forthcoming, it does not lead to the inference that the implication was clearly contemplated by the parties as they committed the language of 5(f) to writing. The evidence establishes that Complainant believed he was entitled to these documents by virtue of the Rules of Civil Procedure and alleged assurances made by the Doctors at the time of the examination. Quite simply, this Judge infers that language addressing the data and reports was never included in the Settlement Agreement and not contemplated in conjunction therewith because Complainant was under the impression that he was going to be receiving that information pursuant to other authority.

Accordingly, this Judge finds that Complainant has failed to establish a breach of paragraph 5(f) of the Settlement Agreement because that paragraph does not require disclosure upon Complainant's consent. The paragraph merely permits that Respondents are no longer obliged to hold that information confidential upon Complainant's consent.

This Judge, assuming **arguendo** that Respondents were required to disclose the records upon Complainant's consent, nevertheless finds that Complainant fails to satisfy his

ultimate burden of proving intentional discrimination by a preponderance of the evidence. The issue, assuming that there has been a breach of the Settlement Agreement, becomes whether or not that breach was motivated by retaliatory animus.

This Judge rejects Complainant's argument that retaliatory animus may be inferred from the fact that Respondent HL&P was going to produce the reports of Drs. Coons and Parker in the course of the previous litigation. It is uncontroverted that Respondents had designated the Doctors as testifying experts whose testimony would have been presented in rebuttal to Complainant's claim for damages. The case was settled, however, and the experts were never required to testify. In this regard, **see Ross v. Burlington Northern Railroad Co.**, 136 F.R.D. 638 (N.D. Ill. 1991), wherein the Court held that the party which intended to offer the expert testimony had the "prerogative of changing his mind" and successfully did so prior to the time that any expert testimony was presented.

Respondents were entitled to re-designate their experts so long as it "does not constitute 'an offensive and unacceptable use of discovery mechanisms' or 'violate [] the clear purpose and policy underlying the rules of discovery.'" **Castellanos v. Littlejohn**, 945 S.W.2d 236, 239 (Tex. Ct. App. 1997) (**Citing Tom L. Scott, Inc. v. McIlhany**, 798 S.W.2d 556, 560 (Tex. 1990)). Texas law permits a testifying expert to be re-designated so long as it is not part of a bargain between adversaries to suppress testimony or for some other improper purpose. **Id.** at 240. **See Generally Hardesty v. Douglas,** 894 S.W.2d 548 (Tx. Ct. App. 1995). In **Castellanos**, the expert had "interviewed" the plaintiff, but had not treated him. 945 S.W.2d at 238.

Despite this ability to re-designate the Doctors, and thereby possibly avoid their being deposed, it is clear that Complainant was entitled to the reports of Drs. Coons and Parker during the pendency of the prior litigation pursuant to Federal Rule of Civil Procedure 35. Wright & Miller **Federal Practice and Procedure** §2237 ("The person examined has an absolute right, on request, to receive a copy of a detailed written report of the examining physician setting out his or her other findings and the results of all tests made, diagnoses, and conclusions"). **See Generally House**, **supra**, at 245 n. 6, 246 (discussing the examined party's entitlement to, at a minimum, the examiner's report). It is not equally clear, however, that Complainant was entitled to a copy of these reports subsequent to the settlement of that claim. It is indisputable, and indeed elementary, that the Rules of Civil Procedure only govern the conduct of parties to litigation. The litigation between Complainant and Respondent HL&P was concluded as of October 25, 1995.

Accordingly, it does not follow from this fairly well-settled state of the law interpreting Rule 35 that pretext is established by the fact that in January 1996 Respondents responded to Complainant's request by claiming that he was not entitled to the reports and data. Whether or not Respondents would have ultimately prevailed on their attempt to withhold the sought after information during the pendency of the previous litigation on

the basis of attorney client privilege is dubious, but that does not mean that they were not entitled to raise that privilege in the post-litigation context.

This Judge is unpersuaded by Complainant's argument that an illegitimate motive is evidenced by the fact that Respondents would not have required that Complainant submit to an independent medical examination but for Complainant's filing of an ERA complaint. (**See Generally** TR 312) It is evident from the turn of events that Respondents did not require submission to that examination until they anticipated being required to respond to Dr. Carter's report which addressed the issue of damages. (**See Generally** TR 294-295, 311-312) I find this significantly distinguishable from a factual scenario, such as that present in **Diaz-Robainas v. Florida Power & Light Co.**, 92-ERA-10 (Sec'y 1/19/96), where an employer orders some type of physical and/or psychological examination as a tool of discouragement from engaging in further protected activity or as an admonishment for past protected activity. As the parties have stipulated, the evaluations done by Drs. Coons and Parker would be kept separate from any fitness-for-duty issues regarding Complainant's employment. (TR 155)

I also reject Complainant's argument that the temporal proximity between Complainant's January 1996 letter to the NRC and the Respondents' refusal to produce the Doctors' records upon Complainant's consent evidences retaliatory animus. Respondents contend, and the evidence of record bears out, that the decision to withhold the records was made at some time prior to January 9, 1996, the date on which Respondents first learned that Complainant was raising concerns to the NRC. (CX 19 "In fact, during the trial we considered the information privileged by the attorney work product doctrine"; RX 30, at p. 5 "During the trial HL&P's counsel refused to produce the psychological reports related to the independent medical examination. HL&P's counsel maintained that the reports were irrelevant to the trial on liability and privileged by the attorney work product doctrine"). I decline, however, to draw any sort of a negative inference from the fact that there was no written objection to Complainant's request because Respondents' time for filing any objection it may have had to the production of the sought after information had not yet expired. Similarly, I do not find a waiver by Complainant in his failure to file a Motion to Compel the information. A mere twelve days expired between Complainant's request for the information (CX 10) and the date the Settlement Agreement was signed. (CX 1/RX 10)

Rather, this Judge finds and concludes that Attorney Helliker's actions do not evidence hostility toward Complainant on the basis of his protected activity. In this regard, I preliminarily note that there is no evidence that anybody from HII and/or HL&P other than Attorney

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Helliker was involved in the decision-making process. Attorney Helliker credibly testified that the NRC letter made no difference to her because she deals with issues like this all the time. (TR 302-303) In response to Complainant's January 29, 1996 request for

the information (CX 18), she offered a continued dialogue. (CX 19) From this Judge's perspective, and I dare say from the perspective of any legal advocate embroiled in litigation or anticipating the possibility of future litigation, it is not unusual for attorneys to disagree about the applicability of a privilege without any thought of discrimination or retaliation.[29] Indeed, it is a fact that the parties to this litigation were engaged in lengthy and complicated disagreement concerning the discoverability of numerous documents during the prosecution of this claim. (ALJ EX 20; 21; 31; 57; 63; 71; 75; 83; 87)

Complainant claims a direct nexus between protected activity and retaliatory conduct is revealed by Attorney Helliker's testimony that the records were not produced because of Respondents' fear of Complainant "backing out" of the settlement and concern about "future litigation." While this testimony does indeed provide a link between Complainant's protected activity and Respondents' thoughts as it decided to respond to the request for the records of Drs. Coons and Parker, it does not establish that kind of discriminatory animus which is prohibited by the ERA.[30] This Judge concludes that concerns about a possible attack on what was intended to be a "global settlement" (TR 300) and the possibility of future litigation with the person with whom that settlement was executed are precisely the sort of things about which attorneys are retained to concern themselves. They are viable considerations for an attorney. I decline to infer action in violation of the ERA on this bare fact alone because it would lead to the unacceptable result of holding these Respondents liable for proceeding cautiously in the face of an anticipated attack on what was intended to finally and completely "end any kind of litigation" and "have [Complainant] go away." (TR 300) This difference of professional opinion, without more, does not prove retaliatory motives. In this regard, **see generally Odom v. Anchor Lithkemko/Int'l Paper**, 96-WPC-1 (ARB 10/10/97) (holding respondent did not violate the ERA based upon, among other facts, the fact that respondent's supervisor investigated and considered complainant's safety concerns, but nevertheless concluded that complainant's recommended remedial action was not required).

I pause to note that in **Delcore**, **supra**, the Second Circuit affirmed the Secretary's prior holding and opined that the tactics employed by litigants would not be protected from the legal constraints of the ERA once an employment conflict degenerated to the point of formal litigation. 85 F.3d at 95. The Court found that the respondent's attempt to impose improper conditions upon the complainant under the cover of a "litigation strategy" violated the ERA. **Id.** This Judge hastens to add, however, that I discern no inconsistency between my holding in this case and the Second Circuit's holding in the **Delcore** case. An inquiry into discrimination is, quite obviously, a fact specific inquiry and the facts presented in this case do not rise to the level of those present in **Delcore**.[31]

This Judge, having found that Complainant has failed in proving by a preponderance of the evidence that the Respondents retaliated against him because of protected activity,

declines to address the alternative arguments raised by Respondents in their post-hearing brief.[32] **See Generally Odom**, **supra**, at pp. 3-4.

Order

In view of the foregoing, it is hereby **RECOMMENDED** that the Administrative Review Board adopt this Judge's various Orders on Motions for Summary Judgment. (ALJ EX 43; ALJ EX 78; ALJ EX 80; ALJ EX 89) It is **FURTHER RECOMMENDED** that the complaint that Respondents violated the ERA by breaching paragraph 5(f) of the Settlement Agreement be **DISMISSED** for the reason that Respondents have not breached the Settlement Agreement or, in the alternative, for the reason that even if Respondents did breach the Agreement, Complainant has failed to satisfy his burden of proving, by a preponderance of the evidence, that Respondents intentionally discriminated against him.

DAVID W. DI NARDI
Administrative Law Judge

Boston, Massachusetts
DWD:jw

NOTICE: This Recommended Decision and Order and the administrative file in this matter will be forwarded for review to the Administrative Review Board, U.S. Department of Labor, Frances Perkins Building, Room S-4309, 200 Constitution Avenue, N.W., Washington D.C. 20210. The Administrative Review Board is the authority vested with the responsibility of rendering a final decision in this matter in accordance with 29 C.F.R. Part 24.6, pursuant to Secretary's Order 2-96, 61 Federal Register 19978 (May 3, 1996).

[ENDNOTES]

[1]In those various orders, this Judge, relying on precedent from the Secretary and/or Administrative Review Board and cases cited therein, held that Complainant could not bring an enforcement action before the Office of Administrative Law Judges absent a provision in the Settlement Agreement which consented to jurisdiction before this Office. This Judge now further notes the recent precedent of **Williams v. Metzler**, 132 F.3d 937 (3d Cir. 1997), 1997 WL 793315, in which the Third Circuit held that the Secretary does not have the authority, even with the consent of the parties, to enforce a settlement agreement resolving a retaliation claim brought pursuant to the ERA. It has yet to be determined whether or not the ARB or the Fifth Circuit will choose to adopt the **Williams** holding in an appropriate case.

[2]An asterisk next to a filing date indicates the filing was made by facsimile transmission.

[3]Only HL&P was named as a party Respondent in that case.

[4]Dr. Coons might have also sent a copy of his report to Dr. Parker. (TR 169)

[5]Complainant later testified that he wanted paragraph 5(f) included in the agreement so that everything about him remained confidential and "could be answered, controlled, and used, if necessary, for access to other nuclear facilities clearances, to ensure that I didn't have a problem also." (TR 130)

[6]Dr. Coons is not obliged to abide by the American Psychological Code of Professional Conduct or the Code of Ethics because he is a medical doctor.

[7]Dr. Coons has testified for the law firm a few times and consulted approximately 15 or 20 times. He has never, however, testified in a DOL proceeding and has never done an independent medical examination in a DOL proceeding. (TR 186)

[8]In this regard, the forensic evaluation is more focused and the patient examination is more general. (TR 198)

[9]It would be out of line for Dr. Coons to be releasing data that had been generated from that relationship. (TR 178)

[10]For example, Dr. Coons stated that his report and notes and other testing data would have been discoverable if someone had taken his deposition or if he had testified as an expert. (TR 188)

[11]The tests done by Dr. Parker would have no impact on tests done by another psychologist subsequent to his tests. It might be helpful to have the tests results, and in a clinical situation this sharing of information happens all the time. (TR 250-251, 252-253)

[12]Psychometrics is the aegis for all kinds of testing and evaluation.

[13]Complainant testified he was not informed of Dr. Carter's lengthy conversation with Dr. Parker in March 1996.

[14]Dr. Parker's October 18, 1995 report would not be one of the psychometrics. Dr. Parker also testified, however, that he would have sent Dr. Carter anything he wanted. (TR 234-235)

[15]It was Dr. Carter's understanding that he needed the records to tie up loose ends for his client and he does not recall having a conversation with Complainant's counsel about needing the records so that Complainant could apply for employment in the nuclear industry. (CX 50, at pp. 55-56)

[16]In fact, the Doctor testified that a notation made by him on March 6, 1996 reflects a comment that "we should get it at some point." This references the fact that the Doctor, Attorney Colapinto and Complainant were anticipating getting the full report, as well as the data.

[17]Attorney Helliker had the authority to waive the privilege. (TR 281)

[18]The complaint in this action had originally alleged violation of the medical benefit provision of the Settlement Agreement as well. Complainant subsequently withdrew his allegation of a violation of the ERA rooted in breach of that provision. (ALJ EX 77)

[19]Attorney Helliker was involved in the negotiation of CX 1, as well as two previously attempted settlements. (TR 307)

[20]Attorney Helliker waffles on this suspicion of malpractice later in her testimony when she testified that she is not aware of any such claim ever being filed. (TR 313-314)

[21]This group reviews and "approves" all safety and employment disputes, including reports of investigation of nuclear safety concerns as well as allegations of intimidation and harassment. (TR 286)

[22]Complainant cites to these meetings in support of its position that the two corporations are a single employer. This evidence, however, indicates to this Judge that each Board held its own meetings and that the HII Board met sixteen times and the HL&P Board met twelve times.

[23]Judge Campbell then relied on Sixth Circuit precedent.

[24]This Judge is compelled to note Complainant's argument that "Reporting concerns about the terms of an ERA settlement agreement is protected activity *as a matter of law*." (emphasis added) In so arguing, Complainant relies upon the **Delcore** case. Complainant overbroadly interprets the holding of that case. In **Delcore**, the Secretary held that the respondent's settlement offer, which contained particularly restrictive gag provisions, would have effectively resulted in an exchange of money for complainant's relinquishment of statutory rights. The Second Circuit affirmed, opining that respondent violated the ERA when it insisted upon these improper conditions as final terms of the agreement. Moreover, the Administrative Review Board has noted that the **Delcore** case "must be narrowly construed." **High**, **supra**, at p. 5.

[25]Let it be clear that I arrive at this conclusion without relying upon Complainant's general policy arguments advanced in his brief. (**See** CX 53, at pp. 47-50) To wit, Complainant argues that Respondents' treatment of the Doctors' records as outside the terms of the Settlement Agreement violates Complainant's right to maintain them confidential and that an employer in ERA litigation should not be able to submit an employee to an intrusive medical examination and then not afford the employee any access or control over those records. While this Judge can appreciate the implications of holding that these records are not within the terms of paragraph 5(f), that does not automatically justify a finding that they are within the ambit of the Agreement. Complainant was well represented during the negotiation and execution of the Settlement Agreement, and I decline to catapult the records at issue into the realm of paragraph 5(f) simply because to do otherwise would result in a poor bargain for Complainant.

Similarly, Complainant's concern with the possibility of discouraging ERA complainants from seeking compensatory damages is not sufficient reason to alter my interpretation of the language of this agreement. If an ERA complainant is seeking compensatory damages, he or she will be the party offering medical and/or psychological records in his or her own behalf in an effort to obtain the most appropriate, in terms of monetary value, award. Surely, Complainant does not mean to suggest that a respondent should not be able to rebut the evidence offered by a complainant and, logically, one of the best means of rebutting that evidence is for a respondent to have its own experts evaluate a complainant and controvert the testimony as provided by the complainant. The parties to a legal action are always free to agree amongst themselves as to how they shall treat certain records, and a litigant may specifically require that his or her submission to such an examination/evaluation is conditioned upon confidentiality. If the parties cannot amicably agree, intervention from the Court may be sought. In sum, an employee has all the access and/or control over those records which he or she insists upon.

[26]In further support of a finding that the records are Complainant's psychological records, I note Complainant's reliance upon the Texas Health Records Act. 611 V.T.C.A. 611.001 and 611.045.

[27]Respondents stress that Complainant should have filed a Motion to Compel the documents and that his failure to do so constitutes a waiver to the records. It is a fact, however, that the Complainant's time for filing such a Motion had not yet expired at the time the Settlement Agreement was executed.

[28]Indeed, there may have been verbal communications to the effect that Respondents assured Complainant's counsel that the reports were forthcoming. (CX 10 "This is to confirm that you will provie [sic] your expert reports to us...")

[29]In this regard, I note a recent article by Professor Charles Yablon of the Cardozo School of Law only for its comments on the tactical advantages of discovery disputes. **Stupid Lawyer Tricks: An Essay on Discovery Abuse**, 96 Columbia Law Review 1618 (1996).

[30]I have drawn the conclusion that Respondents' conduct was not motivated by animus based on Complainant's engaging in protected activity, but rather by realistic concern about an attack on a settlement agreement. It follows, therefore, that the dual motive analysis is not applicable and I decline to address the parties' arguments in its regard.

[31]Specifically, I find the acts in **Delcore** of presenting an offer of settlement only upon an unconditional surrender of certain statutorily provided rights on a take it or leave it basis far more suggestive of animus than a request for submission to a physical examination and subsequent refusal to produce those documents in a post-litigation context on the basis of privilege.

[32]**See Generally** RX 56, at pp. 22-27.